IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1067

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR REHEARING AND CERTIFICATE OF COUNSEL

To the Honorable Justices of the
Supreme Court of the United States.

The Appellant, MILLER BREWING COMPANY, a Wisconsin corporation, by its Attorneys, Frank H. Uriell and Paul A. Teschner, respectfully requests a rehearing in the above-entitled case on the ground that certain points were misapprehended or overlooked by the Court in dismissing that Appeal for lack of a substantial federal question.

PRELIMINARY STATEMENT

In dismissing the Appeal in this case for want of a substantial federal question, this Court apparently felt that the

decision of the Illinois Supreme Court was merely incorrect and that an occasional erroneous and unjust decision of a state Supreme Court, albeit violative of the federal Constitution, does not by itself infuse the questions presented with that degree of substantiality required for plenary argument and consideration. The Appellant understands that this decision of the Court is a pragmatic one and respects it as such.

In this particular case, however, the Court overlooked the substantial, adverse result which its action in dismissing for lack of a substantial federal question will have upon the Bar of the United States. Such a dismissal is inherently equivocal and in this case will cause directly an intolerable and discordant precedential dilemma for lawyers who must attempt to decide the questions presented here, to wit:

(1) *Due Process*—Is the question of whether a state may assess a tax without violating the Due Process Clause of the United States Constitution henceforth to be determined by questions of "ownership" and "title" as the Illinois Supreme Court clearly stated; or should lawyers continue to premise advice upon this Court's decisions which have rejected the "witty diversities of the law of sales" as factors with due process consequences.

(2) *Commerce Clause*—May states now assess taxes against foreign corporations measured exclusively by amounts paid outside the taxing state for one purpose and one purpose only: the attempted creation of a demand by residents of the taxing state for products produced in other states in the course of interstate commerce by the foreign corporation; or should lawyers continue to premise advice upon this Court's decisions holding that if it does nothing else the Commerce Clause jealously nurtures absolutely and keeps inviolate a national market.

POINT I

DUE PROCESS CLAUSE

Although both the Illinois Director of Revenue (R. 3 p. 75) and the Circuit Court of Cook County (R. 3 p. 80) had rejected the concept that "ownership" of the POS advertising items had any relevancy to the question of Appellant's liability for Illinois Use Tax, the Supreme Court of Illinois in fact predicated its entire decision that Appellant was liable for Illinois Use Taxes on the ground that Appellant "owned" the POS advertising items because it had paid for their production and therefore continued to own them when they were sent into Illinois; the Illinois Supreme Court considered it material that the Amended Complaint did not allege with precision a definite transfer of ownership from Appellant to its Illinois wholesale distributors. Because the facts before the Illinois Supreme Court did not, therefore, suffice to show a conscious, affirmative transference of that determined ownership to the Illinois wholesale distributors or to the Illinois Retailers, the Illinois Supreme Court concluded its opinion on that question by remarking that the "* * * Amended Complaint * * * does not assert facts that would call into operation the constitutional doctrines that it advances." (219 N.E. 2nd 494, 496; 35 Ill. 2nd, 86, 92.)

The Illinois Supreme Court's invitation of further litigation is apparent: any taxpayer in the same position as Appellant which is able to show that it has divested itself of "ownership" or "title" as a matter of fact will, in some future case, have succeeded in "calling into operation" the constitutional principles upon which this case is based. The tendency will be for some lawyers to advise clients to enter into a formalistic bill of sale or deed of gift so as to divest them-

selves, outside of Illinois, of "title" to POS advertising items. Such advice would be justified only by treating the decision of the Illinois Supreme Court as an intramural one isolated from the mainstream of decisions of this Court.

Lawyers who would be concerned with squaring their advice with the decisions of this Court, however, would be confronted by its many decisions holding that "* * * neither state courts nor state legislators by giving a specific tax a particular name or by the use of some form of words can remove the duty of the Supreme Court of the United States to consider the nature and effect of a particular tax, an inquiry which will be concerned only with the practical operation of it." (Statement As To Jurisdiction p. 13). Such lawyers would be inclined to premise advice upon the many decisions of this Court holding that states may not assess taxes unless they supply a *quid pro quo* in reference to the privilege taxed.

POINT II

COMMERCE CLAUSE

This Court's dismissal of this Appeal for lack of a substantial federal question does in point of fact result in a holding by this Court which is as follows:

> The question of whether the State of Illinois may assess a tax against a Wisconsin corporation based upon amounts paid by it to Minnesota, Wisconsin, Maryland, and California manufacturers for the cost of fabricating POS advertising items which are then (1) pursuant to directions of the Wisconsin corporation sent directly by said manufacturers to the Wisconsin corporation's independent Illinois Wholesale Distributors, and (2) displayed within Illinois for the single purpose of attempting to create a demand for the Wisconsin corporation's products, is not a substantial ques-

tion arising under the Commerce Clause of the Constitution of the United States.

If that question is not substantial, it is not important. If it is not important, it is not relevant; if it is not relevant, then the Commerce Clause is no longer a limitation upon the power of states to tax advertising communications in interstate commerce. Certainly this Court should declare such a result directly and not *subrosa*.

This Court has repeatedly held that a state may not tax a foreign corporation which pays the salaries of drummers who enter the taxing state for the sole purpose of attempting to create a demand for products produced in other states by the taxpayer and sent into the taxing state for sale. In this case, instead of salaries paid to drummers for a portion only of their services the Appellant pays for the drummers themselves, but in all other relevant respects the transactions are identical: a payment by a foreign corporation in an attempt to create a demand among residents of the taxing state for products produced outside of it and in the course of interstate commerce.

Again we have a major dilemma of substance. How will lawyers square the holdings of this Court that a state may not tax the interstate commerce which *results* from interstate advertising communications with its holding in this case that a state may nonetheless tax the amounts paid to create the demand for interstate commerce? Should lawyers assume that the decision in this case is limited to state power to tax tangible advertising devices such as display items or catalogs which are sent into the taxing state and are the only contact with it; may they not reasonably assume that this power extends to taxing amounts paid to drummers to create an interstate demand; and may not lawyers logically conclude that, because of a presumption

against discrimination between the various methods of communication, this Court here in fact empowers states to tax interstate advertising messages themselves? Are not lawyers entitled to reason, then, that states may accomplish through indirection what cannot be accomplished directly; and if the Commerce Clause is to perish by gradual encroachments, has it not been too good a friend of law and lawyers to be denied the dignity of an honest burial by this Court?

WHEREFORE, Appellant respectfully requests that this Court grant a rehearing upon the Statement As To Jurisdiction, the Motion To Dismiss, and Appellant's Brief In Opposition To Motion to Dismiss previously filed in this action.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Frank H. Uriell and Paul A. Teschner, counsel for Miller Brewing Company, Appellant herein, certify that the foregoing Petition For Rehearing has been filed in accordance with Rule 58.1 of the Rules of the Supreme Court of the United States; and that it is presented to the Court in good faith and not for purposes of delay.

/s/ Frank H. Uriell

/s/ Paul A. Teschner

Frank H. Uriell
Paul A. Teschner
Attorneys for Appellant